

SHORT FORM ORDER

SUPREME COURT- STATE OF NEW YORK
Present: HON. JAMES P. McCORMACK, Acting Justice of the Supreme Court

**TRIAL/IAS, PART 51
NASSAU COUNTY**

IN THE MATTER OF THE APPLICATION OF
AMERICAN TRANSIT INSURANCE COMPANY,

Petitioner,

**FOR AN ORDER STAYING THE ARBITRATION
DEMANDED BY CHRISTOPHER SULLY**

**Index No.: 001422/07
Motion Seq. No.: 001
Submission Date: 3/27/07**

Respondents,

-and-

**JOSEPH NICHIK, NEW ENGLAND MOTOR
FREIGHT, RELIANCE INSURANCE COMPANY
and NEW JERSEY PROPERTY-LIABILITY
INSURANCE GUARANTY ASSOCIATION,**

Proposed Additional Respondents.

The following papers read on this motion:

Notice of Petition/Supporting Exhibits.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

Petitioner, American Transit Insurance Company, moves by verified petition for an order pursuant to CPLR §7503 to permanently stay the uninsured motorist arbitration demanded by respondent Christopher Sully under the uninsured motorist endorsement

issued by petitioner or, in the alternative, temporarily staying the demanded arbitration proceeding pending the determination of the Court after a framed issue hearing and directing respondent Sully to submit to an examination under oath and independent medical examination at the direction of petitioner. Respondent Sully opposes.

This action arises out of a two car auto accident which took place on August 30, 1999 between a vehicle operated by respondent Sully and insured by petitioner American Transit and a vehicle operated by proposed additional respondent Joseph Nichik and insured by Reliance Insurance Company.

In a letter (undated) from New Jersey Property-Liability Insurance Guaranty Association (hereinafter referred as "NJPLIGA"), respondent Sully's counsel was advised that the insurer of the Nichik vehicle, Reliance, had been declared insolvent since October 3, 2001 and that "NJPLIGA," as administrator, was going to administer this claim under the New Jersey Property-Liability Guaranty Association Act (hereinafter referred as N. J. S. A.), §17:30 A-1. The N. J. S. A. Act directed potential claimants, such as respondent Sully herein, to first submit their claim to their respective uninsured motorist carrier before seeking coverage under the N. J. S. A. Act for their claim. (Exhibit C of Petition dated January 24, 2007). There is no indication from this letter that respondent Sully would be covered under the N. J. S. A. Act nor that insolvent Reliance Insurance Company has contributed or paid into the Act to provide coverage for claimants such as respondent Sully. (Id.)

On January 10, 2007, petitioner American Transit received the demand by respondent Sully dated December 28, 2006 for uninsured motorist benefits issued under the policy of automobile insurance coverage to Sully. In its petition dated January 24, 2007, petitioner American Transit avers that, analogous to the facts in Eagle Ins. Co. V. Hamilton, 16 AD 3d 498 [2nd Dept. 2005], respondent Sully's claim that Reliance's insolvency triggers his right to uninsured motorist benefits under his own policy must be rejected. This Court is unpersuaded by this argument for the following reasons.

In the case cited by petitioner in support of his claim that arbitration should be permanently stayed in this proceeding, there was some proof that the respondent there, Hamilton, who sought coverage through his uninsured motorist benefits, would have available coverage through the New York Public Motor Vehicle Liability Security Fund (PMV fund) and, therefore, under Insurance Law §3420 (f) (1), would not be entitled to pursue uninsured motorist benefits through his own insurer (Eagle Ins. Co. v. Hamilton, supra). Here, there is no proof nor suggestion by petitioner that Reliance paid into the PMV fund which would require respondent Sully to pursue his remedies through the PMV fund before seeking coverage from petitioner. Further, there is the unanswered question as to whether respondent Sully has already sought relief from the PMV fund and been denied. (Eagle Inc. Co., supra at 503). There is existing authority for the position that when a insurance provider has not paid into the PMV fund, the subsequent insolvency of that insurance provider would give rise to a valid "uninsured motorist

claim” (State-Wide Ins. Co. V. Curry, 43 NY 2d 298 [1977]; Eagle, supra; American Transit Insurance v. Barger, 13 Misc. 3d 386). Absent proof as to whether Reliance in this instance has paid into the PMV fund and that respondent Sully would be afforded coverage as a result, this Court cannot permanently stay respondent Sully’s demand for arbitration of uninsured motorist benefits.

While denying petitioner’s application to permanently stay arbitration, this Court, however, does find that respondent Sully’s proof as to Reliance Insurance Company being the insurer of the offending vehicle on the date of the accident to be deficient. Other than the undated letter from “NJPLIGA”, there is no further documents such as a declaration sheet, DMV abstract or Registration Plate Record providing adequate proof that the offending vehicle was insured by Reliance Insurance Company.

Based upon the foregoing, it is hereby ordered that petitioner’s application to permanently stay respondent Sully’s arbitration demand is denied. Petitioner’s alternative prayer for a framed-issue hearing is, however, granted to determine the following questions:

- 1) Did Reliance Insurance Company insure the vehicle driven by Joseph Nichik and owned by New England Motor Freight on August 30, 1999?
- 2) If insured by Reliance Insurance Company, did Reliance pay into the PMV fund?

- 3) Would respondent Sully be compensated for his alleged injuries from the PMV fund as a result of the accident of August 30, 1999?

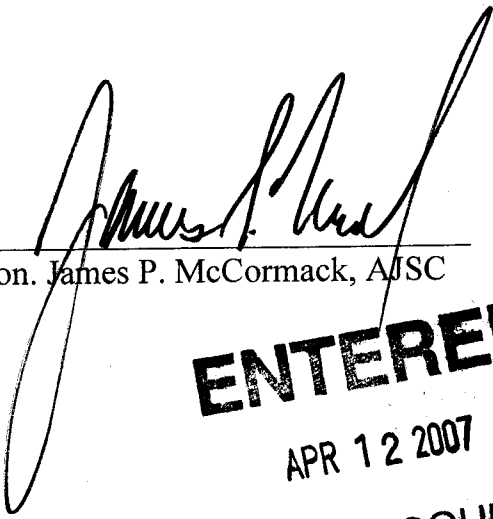
It is further ordered that the proposed additional respondents are added as necessary parties provided petitioner obtains jurisdiction over such parties pursuant to CPLR Article 3 by service of a copy of this order and all papers upon which it is based within twenty (20) days after entry. A failure to add such parties may result in a dismissal for the failure to add a necessary party. (See CPLR §1003). There shall be a response to the petition by added respondents to be served not later than thirty (30) days after jurisdiction has been obtained.

Petitioner's further request that respondent Sully submit to an examination under oath and to an independent medical examination shall be deferred to the sound discretion of Justice of this Court that will conduct the framed-issue hearing and the determination of the questions outlined infra.

Petitioner shall serve and file a Note of Issue no later than ninety (90) days after entry of this order in default of which the action will then be deemed abandoned. A copy of this order shall accompany the Note of Issue when filed accompanied by proof that a copy has been mailed to all parties to the original petition within fifteen (15) days after entry.

This constitutes the decision and order of this Court.

Dated: April 5, 2007



Hon. James P. McCormack, AJSC

ENTERED

APR 12 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE